

Tuesday, 12 November 1946

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
CONFERENCE ROOM OF THE TRIBUNAL
Room 216
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Applications of the following Accused
for the production of witnesses and
documents under the Charter:

Paper No. 515 of ARAKI, Sadao
Paper No. 516 of HATA, Shunroku
Paper No. 517 of DOHIHARA, Kenji

Paper No. 539 - Application of the
Accused ARAKI by American Counsel,
relative to the status and relation-
ship of the Prosecution regarding
witnesses and documents to be produced
on behalf of the Defendants under the
Charter.

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

Robert B. Morse
Court Reporter
IMTFFE

Appearances:

FOR THE PROSECUTION SECTION:

Mr. E. Williams

Mr. Solis Horwitz

FOR THE DEFENSE SECTION:

MR. LAWRENCE P. McMANUS, Counsel for
Accused ARAKI, Sadao

MR. FRANKLIN E. N. WARREN, Counsel for
Accused DOHIHARA, Kenji

LIEUT. ARISTEDES LAZARUS, Counsel for
Accused HATA, Shunroku

MR. G. F. BLEWETT, Counsel for
Accused TOJO, Hideki

MR. OWEN CUNNINGHAM, Counsel for
Accused OSHIMA, Hiroshi

MR. BEN BRUCE BLAKENEY, Counsel for
Accused UMEZU, Yoshijiro

OHTA, Kinjiro, Counsel for Accused
DOHIHARA, Kenji.

FOR THE OFFICE OF THE GENERAL SECRETARY, IMTTF:

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat

MR. CHARLES A. MANTZ, Clerk of the Court

MR. H. W. DELANEY, Deputy Clerk of the
Court

The Proceedings were begun at 0900.

THE PRESIDENT: The first is a request for production of witnesses by the Accused ARAKI, and a list of twenty-six witnesses follows. He is also requesting production of sixteen documents. Who appears for the applicant?

MR. WARREN: I think, sir, that some of those are mine.

THE PRESIDENT: But who is appearing for the Accused ARAKI?

MR. WARREN: Well, it is ARAKI, Sadao but it is signed for DOHIHARA, Kenji, I believe, isn't it?

THE PRESIDENT: It is signed for ARAKI by Counsellor SUGAWARA.

MR. WARREN: I am sorry. That isn't the one I have.

THE PRESIDENT: Mr. McManus.

MR. McMANUS: May I inquire, what is the inquiry?

THE PRESIDENT: The application is for witnesses and documents by the Accused ARAKI.

MR. McMANUS: Yes. Does your Honor want an explanation as to each individual witness?

THE PRESIDENT: Yes, I think I shall have to

get you to tell me what evidence they would be able to give that would be material. Not very fully, but just enough to satisfy me.

MR. McMANUS: May I inquire as to this extent, whether or not the prosecution should be present while I am making such an explanation?

THE PRESIDENT: Well, I understand that in Germany they were present.

MR. McMANUS: Well, if your Honor please, of course, I have no hesitancy in making an explanation, but I think it should be a confidential matter between the Court and Defense counsel. I don't think I should give my whole defense to the prosecution, particularly in so far as their case is not over yet and they should possibly have the opportunity of plugging up any holes or anything that they have missed.

THE PRESIDENT: I think the prosecution could shorten matters by saying --

MR. E. WILLIAMS: We don't care anything about being present, Mr. President. The only matter we are interested in is this paper No. 539 which is the fourth one on the calendar for this morning. If we could be notified before any proceeding is taken under 539, we would be very happy to withdraw in the meantime because we haven't the slightest curiosity as to what these

people are expected to testify to.

THE PRESIDENT: I have before me papers 515, 516, and 517.

MR. E. WILLIAMS: If 539 isn't on this morning, we have no desire to be here at all. If 539 is to be heard we wish to be heard in opposition to it.

THE PRESIDENT: What is 539 about? Is it set down for hearing today?

MR. McMANUS: Yes, Judge. I think it was set over to Tuesday. I have a copy right here, your Honor.

THE PRESIDENT: Well, we had better take that. We will defer consideration of the first application and proceed to consider the application for an order on behalf of the Accused ARAKI prohibiting the prosecution section from questioning or approaching witnesses for the defense. You appear, Mr. McManus, for the applicant?

MR. McMANUS: Yes.

THE PRESIDENT: And you, Mr. Williams, for the prosecution?

MR. E. WILLIAMS: Yes, I am appearing for the prosecution.

THE PRESIDENT: Well, will you support your application, Mr. McManus.

MR. McMANUS: Well, if your Honor pleases, it

is very difficult, and I am sure that your Honor can understand how difficult it is, to obtain any witnesses here on behalf of any of the accused for the simple reason that if you approach any one they feel or they are in a position where they don't want to say anything because of the fact they might be considered somewhat of a criminal, being a conquered nation, they might be somewhat of a criminal themselves -- or at least they feel that way -- and it is very difficult to obtain any witnesses for any of the accused. Consequently, if any of the liaison officers or any one of the investigators approach any of these witnesses for the defense, does your Honor think, in all fairness, we can possibly get any truth out of them if they were approached by any member of the prosecution organization before they are brought before us? If your Honor please, that is only one of the twenty-three canons of ethics back home where you can't tamper with another person's witness. I don't say the prosecution is tampering with our witnesses, but it is tantamount to the same thing, but approaching them.

THE PRESIDENT: Can we shorten this by asking Mr. Williams whether he has any intention of approaching any of the witnesses sought?

MR. E. WILLIAMS: I don't know what witnesses

have been sought. We have no intention of going out and questioning witnesses who may be sought by the defense but not only do we have these accused but we have many other accused in addition to them. It may be individuals who may be witnesses for the defense may also be witnesses we want to call.

THE PRESIDENT: Will you let me speak? I explained to Mr. McManus the other day that the defense, if they so wished, might subpoena every witness they knew the prosecution would be calling and thereby prevent the prosecution from making its case. That prevents a general order being made, but I think Mr. McManus had in mind cases where the witnesses were not required by the prosecution. In such cases I would be inclined to say the prosecution should not attempt to approach them. It is a matter of etiquette.

MR. E. WILLIAMS: We have no idea of going out and making efforts to prevent witnesses from testifying or trying to get them to testify differently than they would. In other words, we don't intend to do what was done by two defense counsel in this case by getting a witness for the prosecution and getting them in their homes and offices and talking to them for an hour or so before they got on the witness stand. The whole thing lies in a misconception of the rule of

a witness in the case. A witness is not a prosecution witness or defense witness. A witness is a witness to facts, doesn't belong to one side or the other. The fact that one side happens to subpoena him first does not make him a closed book. I don't have any such conception or haven't heard of any such conception in the law. I wish it recognized that every lawyer in any civilized country, so far as I know, has an obligation not to use any improper methods or means in connection with witnesses either that he subpoenaed or the other side subpoenaed, but to subject either the prosecution or the defense to a blanket order that no witness who happens to have been intended to be a witness for the other side, or subpoenaed by them, shall not be questioned on any subject seems to me to go beyond the scope of a legitimate order.

THE PRESIDENT: Can I shorten it this way, by asking you if you have any intention of approaching any witness that the accused ARAKI is seeking to get through this Court?

MR. E. WILLIAMS: None whatsoever.

THE PRESIDENT: And, further, that you will not approach any of them without first coming to me in Chambers and giving notice of your application to Mr. McManus.

MR. E. WILLIAMS: I would be very happy to do that. Of course, we have one difficulty that is somewhat of a difficulty. We have rather a large organization. We don't know the names of those witnesses who have been asked for by the defendants; in fact, the defense has just asked your Honor to have us leave the room so we won't know who their witnesses are.

THE PRESIDENT: No. So you won't know what evidence it is intended they should give.

MR. E. WILLIAMS: Our thought about the matters is that there should very properly be an understanding that we wouldn't go out and try to coerce these witnesses one way or the other, but that we should be limited in questioning them if we have any legitimate reason for questioning them is something I think would be rather arbitrary and uncalled for. We have certainly at no time, since this prosecution started, asked for an order that the defense should not question our witnesses and yet we provide the names of our witnesses and copies of their affidavits in advance.

THE PRESIDENT: That is the usual custom in our country, that a praeceipe is placed on the file when a witness is subpoenaed.

MR. E. WILLIAMS: We just feel that what the Court should do, if I might make a suggestion, is to

make no order except to let us know very definitely, which we don't have to be told, that any improper conduct on our part would be subject to censure and action by the Court. We understand that already without having to be told.

MR. McMANUS: If your Honor please, I think if there is any intention on the part of the prosecution to approach any of these witnesses I am fully in accord with your Honor's suggestion that they obtain permission from the Court to do so.

THE PRESIDENT: Mr. Williams has undertaken to do so. I will be readily available and so will you.

MR. WILLIAMS: The only thought I had is this, and that thought might cause some trouble -- I think we ought to be frank about it -- we have our investigating section; we are investigating other matters besides this case; and it is possible in the course of some investigation one of our investigators may run into one of these witnesses. All I can say is we have no intention of questioning any of these witnesses about any matter that has anything to do with this trial and so far as I am concerned I would be very happy to approach your Honor.

MR. McMANUS: There are several witnesses of mine in Sugamo Prison being held without any charges,

possibly on the brink of release or possibly being held for some future charges. It is definitely impossible because of the axe over their head to get them to tell me anything.

THE PRESIDENT: If you are talking about men in Sugamo I suppose they were put in there by the prosecution with a view to indicting them.

MR. HOROWITZ: Let's correct that for the record, your Honor. The prosecution has only put two people in Sugamo and they are both in the present dock.

MR. McMANUS: There is also a man by the name of MAZAKI and also a man who testified for your people. I don't know whether I have his name right here.

MR. WARREN: I can get it for you in a second. I think I might settle that particularly misunderstanding. The International Prosecution Section and the Legal Section of SCAP is entirely different and most of those prisoners are put there as a result of having been placed there by the Legal Section of SCAP, but they are, nevertheless, there and it does make it very difficult to talk to them.

MR. E. WILLIAMS: Of course, that is a subject entirely different from the subject that is intended in this matter of --

THE PRESIDENT: I understood Mr. McManus to

say some of his witnesses, or prospective witnesses, were in Sugamo. It would be very difficult for me to make an order preventing the prosecution from interrogating them.

MR. McMANUS: I have no intention along that line, if the Court please. Just these witnesses I have requested, I don't want them approached so they are not in a position to tell me everything or tell me the truth of what they know because of fear. If they are approached by the prosecution, anyone can understand how that could happen.

MR. E. WILLIAMS: Let's understand this very clearly. We are well aware of the fact that as lawyers we are prohibited from engaging in any such conduct as that. We will undertake not to threaten, intimidate or coerce any witnesses, either defense witnesses or prosecution witnesses, so-called, but we feel that it is something that is actually rather too arbitrary for the Court to consider to say that we should not talk to people simply because they have been subpoenaed by the defense. /s a matter of fact, in my state both sides are at liberty to question anybody who may be a witness to any fact in any cases. There is no prohibition about it, but both sides are prohibited by the canons of ethics from engaging in any improper

conduct. I don't see why there should be any such order here at all.

MR. McMANUS: Might I say this, your Honor, about one particular fact that happened during the course of this trial, and might I call on Mr. Blakeney to please explain to the Court the situation that happened to one of his witnesses. Major, would you explain to the Court exactly what happened to one of your witnesses?

MR. BLAKENEY: I will state the facts as I know them from hearsay. When MATSUMURA, who was brought here by the prosecution and made available to me on my request -- I had a subpoena outstanding for him -- after I interviewed him as a witness and prepared his affidavit he declined to sign it without making rather extensive modifications and told me -- I, of course have no way of ascertaining the truth outside of what he told me -- he told me he had been fully interrogated after I had questioned him as to what I had asked him, and gave me the name of the interrogator, and told me he had been threatened with severe punishment if any discrepancy were found between his testimony as given for the prosecution and his testimony as given for me. I, of course, told him I didn't want any discrepancy to appear; all I wanted was the fact.

Nevertheless, my affidavit was practically valueless as compared to what it would have been in the first draft. Those are the circumstances and, of course, as I say, I have only the statement of the witness himself as to what occurred. As to whether what occurred is the reason for his change of testimony, I can't say.

MR. WARREN: Of course, we are all vitally interested in this matter. I maybe didn't make myself clear. In criminal prosecution generally in the United States, the prosecution is required to endorse the names of witnesses, especially in a capital case, for the use of the defense so the defense may interrogate those witnesses at any time, but the defense -- of course, if you subpoena a witness you do file for a praecipe, the witness is brought in and the prosecution knows you have that witness, but if you don't wish to file a praecipe you don't have to and the prosecution, under those circumstances, doesn't talk to those witnesses. And especially as I have heard occurred and, like the Major, I don't know the lawyers aren't to blame, but these investigators with absolutely no sense of ethics and no curiosity to find out about them intimidate these witnesses. I imagine that might happen on both sides. That thing has occurred and it is an ethical question that may not have been called to the attention

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of the prosecution that those things were occurring, but it is something that in the interest of justice ought not to be permitted.

MR. E. WILLIAMS: I might say if you called our attention to anything of that sort we would have no trouble running it down and finding out what is happening. As a matter of fact, most of our investigators are lawyers and thoroughly conversant with the canons of ethics and have been instructed to so conduct themselves so as to be subject to no criticism whatsoever. But I think this whole conception is based on an erroneous premise, and that is that a witness belongs to either side. A witness is not property; he is simply a human being who happens to know something about certain facts which are in a lawsuit, and why one side or the other should have the exclusive right to deal with that witness, to find out what he knows, is something that is entirely beyond my concept.

MR. McMANUS: If your Honor please, we have been placed in a very peculiar situation here by having to supply our witnesses before the end of the prosecution's case. Now if the prosecution has a case and they want to present it, let them do so, but if we are to present here the witnesses and they have an opportunity to go out and interrogate them and so forth

and if their case is not a case as it should be they have an opportunity to plug up the holes. To do this we have to lay bare our defense before their case is over. Now, that has been our handicap. If we are doing that, at least we should have the protection of the Court to at least have a confidential relationship and not to permit the prosecution to plug up the holes in their case, even though the Court wants the truth which they should have. But why permit them to put in on their direct case something that should come in later on rebuttal?

MR. E. WILLIAMS: Of course, that is a subject that is entirely aside from the issue. It is based on the idea that a lawsuit is a game. As a matter of fact, we have no intention or thought of making any wholesale examination of their witnesses but if we wanted to, it is perfectly proper. The purpose of the thing is to get the truth before the Court. That is the object of the thing.

MR. McMANUS: What right has the prosecution to assume an attitude of any such importance, anything other than any other officer of the Court such as defense counsel? What right have they to ask the Court to delegate them such authority? Everyone is supposed to follow the canons of ethics and this is definitely one

of the twenty-three canons of ethics.

MR. E. WILLIAMS: There is no canon of ethics any place in the United States that says that either side is prohibited from questioning a witness that has been subpoenaed by the other side.

MR. McMANUS: In a situation like this --

MR. HOROWITZ: I think what happens in court with these Japanese witnesses shows how much intimidation was done and how much you can coerce them.

THE PRESIDFNT: I wouldn't say there has been any intimidation but there has certainly been a change of view in the box. Whether that is intimidation or a desire to tell the truth I can't say.

MR. WARREN: Of course, your Honor, what we are concerned with is intimidation, or threat of intimidation. So far as I am concerned, with my own client, if this matter comes up and I have to file an application, I wouldn't want my witnesses intimidated. I never have any hesitancy in any counsel talking to my witnesses but that, as I understand it, isn't a mere question of preparing their case and talking to the witnesses. It is a question of inuendo by action, if not by word by deed, that these witnesses are intimidated and frightened. The prosecution publishes the fact that many more men will be tried

before this Tribunal, or at least they want to try them before this Tribunal or its successor, and these men never know where the iron is going to strike. We are in the position where if we were trying an ordinary criminal prosecution we certainly wouldn't disclose our witnesses or at least file an application as we have here and tell them the purpose that the witness would be used for, until we had first had an opportunity to argue a motion for a finding of not guilty or demur to the evidence or some similar procedural matter. It has placed us in that position. I think the prosecution should be required to come to your Honor, or to some Member of the Tribunal delegated by your Honor, to see about these matters and if they want to talk to these witnesses let them talk to them in the proper manner with the proper attitude. And there is no reason for an investigator to go out and browbeat that man whether he is a lawyer or not. If they want to sit down and talk to these men, certainly I can see no objection to that. That is their right in my opinion. But the matter is becoming increasingly serious and that is the reason, I am sure, he filed his application.

MR. F. WILLIAMS: I deny that the matter is becoming increasingly serious. I deny any witness has

been browbeaten or intimidated by any investigator of the International Prosecution Section. If counsel have any such facts, all they have to do is give us the circumstances and we will take care of them.

MR. WARREN: There is another set of investigators here. The International Prosecution Section and the Legal Section of SCAP are separate only because they are separate administrations, but as far as the trial of the accused is concerned --

MR. WILLIAMS: As a matter of fact, the defense is closer to the Legal Section of SCAP than the International Prosecution Section.

MR. WARREN: We are much closer than we have wanted to be.

THE PRESIDENT: We are getting away from the point. As is frequently said, a criminal trial is not a tournament between counsel. It may be a rule of fairness in all the circumstances here to adopt a rule to the effect that if the prosecution doesn't require certain witnesses and those witnesses are subpoenaed by the defense, the prosecution should not approach those witnesses. I understand Mr. McManus is not attempting to prevent the prosecution from calling the witnesses by subpoenaing them for the defense. Well, now, we are down to a very narrow class

of witnesses and it would seem to me there is no possibility of the prosecution approaching witnesses in that particular class. I see no reason for an order but I won't dismiss the application. I will adjourn it for further consideration to be brought on by the defense on a day's notice to the prosecution.

MR. McMANUS: That is satisfactory to us.

MR. E. WILLIAMS: I understand the other three matters are matters which involve the disclosure of witnesses' testimony so we will be very happy to withdraw.

THE PRESIDENT: I must tell the shorthand writer when taking the representation of the applicants for the witnesses as to the evidence they are to give that the transcript is not to be circulated generally, is to be given only to the judges, and is to be treated as most confidential and for perusal by the judges only.

I will adjourn the application until a quarter to one.

(Whereupon, at 0930, the proceedings were adjourned.)

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